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No. 66

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1963

**UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION,**

Appellants,

v.

J. B. MONTGOMERY, INC.,

Appellee.

**On Appeal from the United States District Court
for the District of Colorado**

**PETITION FOR REHEARING
J. B. MONTGOMERY, INC.**

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April 17, 1964

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J. B. Montgomery, Inc., appellee, presents this, its petition for a rehearing of the above entitled cause and, in support thereof, respectfully states:

In affirming the judgment of the District Court, it is respectfully submitted that the Court has raised a matter which the lower Court and the parties had not considered to be in issue. In remanding the case to the Commission,

this honorable Court has dictated that the Interstate Commerce Commission has the authority to limit the appellee's Certificate to bona fide past operations conducted under its Permit. The parties to this cause had conceded that a criterion of bona fide past operations was not applicable under Section 212 (c) of the Act and this position was subscribed to by the District Court. Consequently, the issue was not argued orally or on brief before this honorable Court. The resolution of the issue has a material effect on the construction of Section 212 (c) of the Interstate Commerce Act and the parties hereto. It is therefore equitable that rehearing be granted so that the position of the parties as it relates to this issue may be presented to the Court.¹

The appellee, constant with the leading administrative decision, *T.T. Brooks Trucking Co., Inc., Conversion Case*, 81 M.C.C. 561 (1959),² contends that Section 212 (c) does not require a showing of prior operations under a permit as a prerequisite to conversion and that this section of the Act merely provides for a restatement of the existing contract carrier operating rights in the form of

¹ As evidenced by the Congressional Record, many carriers harbored a fear that their authority would be abrogated. See *Hearings before the United States Senate Subcommittee on Surface Transportation of the Committee on Interstate and Foreign Commerce*, 85th Cong. 1st Sess., Surface Transportation Scope of Authority of I.C.C., pp. 35 and 182. It is therefore befitting that this honorable Court allow appellee to present its views on this issue since it is the contention of the appellee that the use of a bona fide operations test could result in a diminution of authority contrary to the intent of the legislators.

² The Commission in the instant cause, consistent with the *Brooks* case held that past operations were not a criterion in a conversion proceeding. See p. 43 of the Transcript of Record.

a certificate authorizing the converted carrier to perform the same transportation it formerly could as a contract carrier.

Section 212 (c) speaks primarily of "operating authorities" as distinguished from "actual motor carrier operations" in providing the underlying basis for conversion of contract carriers to common carriers. The clear and unambiguous term "authorized" is used in the conversion equation.

Where, as here, operating rights of a converted carrier constitute the predominate language factor in section 212 (c), the scope and extent of the transportation a converted carrier shall be authorized to perform in a certificate issued thereunder is not considered as dependent upon actual physical operations. See 81 M.C.C. at 570.

In the *Brooks* case, *supra*, the Interstate Commerce Commission not only adopts the same position subscribed to by the appellee, 81 M.C.C. at 570, but at a subsequent point in the decision, 81 M.C.C. at 577, reiterates it as follows:

... section 212 (c) differs from other "grandfather" provisions of the statute in that it contains no requirement that the converted carrier prove past bona fide operations, and in that it has for its basis not the actual operations performed by the carrier but those authorized by its existing permits ...

Continuing, the Commission at page 577, stated:

... this Commission is not given the power by section 212 (c) to revoke dormant segments of operating authority, either as a condition to converting certain other segments of a carrier's authority or otherwise, but that dormant contract carrier operating rights can be revoked only by appropriate proceedings under section 212 (a) and (3) ... dormancy of operating rights is not an issue to be considered in determining conversion proceedings ...

4

Prior to this honorable Court's decision, the judiciary had also unanimously subscribed to the construction which the parties had given to Section 212(c).

The District Court in this cause, for example, specifically found that section 212 (c) did not authorize the Commission to "... determine bona fides of prior operations." See 206 F. Supp. at 460. Although reaching contrary conclusions on other issues, the Courts in *P. Saldutti & Sons, Inc. v. United States et al.*, 210 F. Supp. 307 (D. N.J. 1962) and *Zueich Truck Lines, Inc. v. United States*, 224 F. Supp. 457 (D. Kan. 1963), agreed that the controlling factor in a conversion proceeding is the operating rights *authorized* by the carrier's permit. See, for example, 210 F. Supp. at 314.

This unanimity undoubtedly flows from the statutory language of Section 212 (c) which, as applicable, reads:

... Such certificate so issued shall authorize the transportation, as a common carrier, of the same commodities between the same points or within the same territory as *authorized* in the permit. (emphasis added)

It would appear that if Congress had intended to equate conversions on the basis of past bona fide operations, the legislators would have made such intent clear by the simple substitution of the words "conducted under" in place of "authorized in."

The appellee, as a contract carrier, was able to provide and institute any type service or movement required of it if such service involved the carriage of the commodities authorized, under contract with the designated type of shippers, within the geographical limits set forth in the permit. If a new type service or movement was required,

it could be instituted if the permit were viable.³ Under the test established by the Court, the authority of the appellee could be limited to the precise movements which were actually conducted as a contract carrier. The appellee would not be free to institute service involving a new type of movement. This limitation arises solely from the conversion. Although this honorable Court makes it clear that Congress did not intend to disturb any property rights of a converted carrier, the test it espouses will preclude the appellee from instituting services which it could as a contract carrier. Appellee asserts that the abrogation of this right is repulsive to the specific language of section 212 (c) and has no support in the legislative history of the Act.

It is therefore respectfully prayed that this petition for rehearing be granted and that the judgment of this honorable Court, upon further consideration, be modified to decree that on remand, the Commission issue a certificate permitting the appellee to perform the same operations *authorized* under its contract carrier permit.

Respectfully submitted,

CHARLES W. SINGER

Attorney for Appellee

April 17, 1964

³ A permit is viable until revoked pursuant to section 212(a).

⁴ Under Commission precedent, the various types of movements made by the carrier in meeting its obligation under the permit is not an issue in dormancy cases. The Commission is concerned with whether any substantive operations are being conducted and whether the obligation is being met.

APPENDIX

STATUTES INVOLVED

Section 212 (a) of the Interstate Commerce Act (49 U.S.C. 312 (a)) provides

- (a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this chapter, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however, That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 304 (c) of this title, commanding obedience to the provision of this chapter, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: And provided further, That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of sections 306, 309 or 311 of this title or by virtue of the second proviso of section 306 (a) of this title or temporary authority under section 310a of this title, may be suspended by the Commission, up-*

on reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of sections 311 (c), 317 (a), or 318 (a) of this title or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

Section 212 (c) of the Interstate Commerce Act (49 U.S.C. 312 (c)) provides:

(c) The Commission shall examine each outstanding permit and may within one hundred and eighty days after the date this subsection takes effect institute a proceeding either upon its own initiative, or upon application of a permit holder actually in operation or upon complaint of an interested party, and after notice and hearing revoke a permit and issue in lieu thereof a certificate of public convenience and necessity, if it finds, first, that any person holding a permit whose operations on the date this subsection takes effect do not conform with the definition of a contract carrier in section 203(a) (15) as in force on and after the date this subsection takes effect; second, are those of a common carrier; and, third, are otherwise lawful. Such certificate so issued shall authorize the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit.

CERTIFICATE OF COUNSEL.

I, Charles W. Singer, attorney for J. B. Montgomery, Inc., appellee, and a member of the Bar of the Supreme Court of the United States, do hereby certify that this petition for rehearing is filed in good faith and not for the purpose of delay.

Charles W. Singer

PROOF OF SERVICE.

I, Charles W. Singer, attorney for J. B. Montgomery, Inc., appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the Sixteenth day of April, 1964, I served copies of the foregoing petition for rehearing for the appellee on the several parties thereto, as follows:

1. On the United States by mailing copies in duly addressed envelopes with air mail postage prepaid, to the Honorable Archibald Cox, The Solicitor General, Department of Justice, Washington 25, D.C.; Lee Loevinger, Esq., Assistant Attorney General, Department of Justice, Washington 25, D.C.; Robert B. Hummel, Esq., Attorney, Department of Justice, Washington 25, D.C.; Elliott H. Moyer, Esq., Attorney, Department of Justice, Washington 25, D.C.; Arthur J. Murphy, Jr., Esq., Attorney, Department of Justice, Washington 25, D.C.; and to Lawrence M. Henry, Esq., United States Attorney for the District of Colorado, Denver, Colorado.

2. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to Robert W. Giannane, Esq., its Chief Counsel, Interstate Commerce Commission, Washington 25, D.C., and Betty Jo Christian, Attorney, Interstate Commerce Commission, Washington 25, D.C.

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